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In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD S. DEMAREST, PETITIONER

v.

JAMES MANSPEAKER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether petitioner, a convicted state prisoner who testified as a defense witness in a federal criminal case, is entitled to receive a witness fee under the federal witness fee statute, 28 U.S.C. 1821.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 11-22) is reported at 884 F.2d 1343. The order of the district court (J.A. 9-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1989. A petition for rehearing was denied on October 23, 1989. J.A. 24. The petition for a writ of certiorari was filed on October 28, 1989, and was granted on April 23, 1990. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1821 and 1825 of Title 28, United States Code, are set forth in pertinent part in an appendix to this brief.

STATEMENT

1. In March 1988, petitioner was serving a state criminal sentence at the Arkansas Valley Correctional Facility in Crowley, Colorado. The defendant in a federal criminal case, *United States* v. *Ronald Brooks Tippett*, No. 87-CR-386 (D. Colo.), requested the district court's assistance in arranging for petitioner to testify as a defense witness. The court issued a writ of habeas corpus ad testificandum directing the United States marshal and the state prison authorities to produce petitioner at trial.

On March 3, federal marshals transferred petitioner from the state prison to the Denver County Jail. The *Tippett* trial began on March 7 and ended on March 18; petitioner testified on March 15. Petitioner remained at the Denver County Jail until April 5, when he was returned to the Arkansas Valley Correctional Facility. J.A. 2, 9.

Invoking the federal witness fee statute, 28 U.S.C. 1821, petitioner sought to obtain a fee for his service as a witness. Petitioner asked respondent James Manspeaker, the clerk of the district court, to certify under 28 U.S.C. 1825(a)(2) that petitioner was eligible to receive a witness fee, and to forward that certification to the United States marshal for payment of the fee. J.A. 2.[1]

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[1] Petitioner sought the $30 per day witness attendance fee (see 28 U.S.C. 1821(b)) for a period of 10 days—the two days he spent traveling between the state prison and the county jail and the eight days he spent at the county jail pending the trial proceedings. J.A. 3.

Respondent Manspeaker did not prepare the certification. Instead, he forwarded petitioner's request to the United States Attorney, who advised petitioner that he was not entitled to a witness fee for his service as a witness in the *Tippett* trial. J.A. 2-3.

2. On May 25, 1988, petitioner filed an action against respondent Manspeaker and a deputy clerk of the district court, seeking an order directing respondent to certify petitioner's request for the witness fee. J.A. 1-8, 9. On June 1, the district court denied the petition and dismissed the complaint. J.A. 9-10. The court concluded that petitioner's action was meritless because "[i]nmate witnesses are not entitled to receive witness fees." J.A. 9 (citing *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter*, 697 F.2d 103, 104 (3d Cir. 1982); *Meadows* v. *United States Marshal*, 434 F.2d 1007, 1008 (5th Cir. 1970), cert. denied, 401 U.S. 1014 (1971)).

3. A divided panel of the court of appeals affirmed. J.A. 11-22.[2] In the court of appeals, petitioner contended "that the plain language of [28 U.S.C. 1821(a)(1) and (b)] mandate the payment of attendance fees to a witness, regardless of whether or not that person is incarcerated." J.A.

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[2] Three other convicted state prisoners, who had testified as defense witnesses at the *Tippett* trial, also filed actions in the district court seeking witness fees. The district court dismissed each action. The court of appeals consolidated the appeals from those orders with petitioner's appeal. J.A. 11-13; see Pet. 4. Those prisoners have not sought review of the appellate court's judgment in this Court.

14. The court of appeals, however, concluded that "[d]espite the unqualified wording of [28 U.S.C. 1821(a)(1) and (b)], strong evidence exists to support the view that Congress never intended § 1821 to apply to individuals incarcerated for criminal acts." J.A. 14. The court observed that "[s]ince at least the year 1900, the Treasury Department has taken the position that imprisoned individuals, other than those detained as a material witness, are not entitled to witness fees." J.A. 14 (citing 6 Dec. Comp. Treas. 588, 588 (1900)). And in the early 1970s, two federal courts held that the similarly drafted predecessor to Section 1821 "did not entitle criminal inmates to witness attendance fees." J.A. 15 (citing *Marchese* v. *United States*, 453 F.2d 1268, 1271 (Ct. Cl. 1972); *Meadows* v. *United States Marshal*, 434 F.2d at 1008). When Congress revised Section 1821 in 1978, the court pointed out, "[n]owhere in the express language of the revisions or in the legislative history did Congress indicate criminal inmates, other than material witnesses detained for want of security for his appearance, were entitled to a witness fee." J.A. 15. "Had Congress meant to change the existing judicial and administrative interpretations of § 1821," the court thus concluded, "it surely could have done so in more express terms." J.A. 15.[3]

[3] The court pointed out that since the 1978 revisions, other courts of appeals have also determined that convicted prisoners are not entitled to witness fees under Section 1821. J.A. 16 (citing *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter*, 697 F.2d 103, 104 (3d Cir. 1982), aff'g *In re Witness Fees for Prisoners*, 533 F. Supp 401 (E.D. Pa. 1982)). The court noted that the Department of Justice has promulgated regulations to the same effect. J.A. 16 (citing 28 C.F.R. 21.4(d)).

Finally, the court identified two other factors supporting the view that convicted prisoners are ineligible to receive witness fees. First, Congress revised Section 1821 in 1978 "because existing witness fees and allowances 'no longer compensate the average witness for the actual costs which witness service entails.'" J.A. 16 (quoting H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978)). Other than the loss of "the very modest compensation they might receive from participating in prison job programs," the court reasoned, convicted prisoners "generally do not incur financial costs serving as a witness." J.A. 16. Second, the court envisioned a potential for abuse in circumstances that would encourage prisoners to file suit and seek to have "friends among inmates [testify] as witnesses, not only for the trip they would receive outside the prison, but for the profit from the witness fee." J.A. 16.

Judge Ebel dissented. J.A. 17-22. In his view, the court "mistakenly has ruled upon congressional silence and upon the [court's] own policy desires to abrogate the plain language of the statute." J.A. 17. Judge Ebel stated that the language of Section 1821 was "clear and unambiguous," and that "[n]othing in the statute states that 'a witness' excludes witnesses who happen to be prisoners." J.A. 17.

SUMMARY OF ARGUMENT

A. Petitioner, a convicted state prisoner who testified as a defense witness at a federal criminal trial, seeks a witness fee for that service. As a threshold matter, however, petitioner is not entitled to the necessary certification under 28 U.S.C. 1825(a)(2)—the relief he sought in the courts below—since he has not satisfied the statutory requirements. In order to receive such a certification in the circumstances presented, the witness must appear "under a subpoena issued upon the approval of the court" and must have "an affidavit of [the witness's] attendance" prepared by the defendant's attorney. Here, however, petitioner asserted that he appeared at trial under a writ of habeas corpus ad testificandum, not under a subpoena, and he made no claim that the defendant's counsel prepared the requisite affidavit. Since petitioner's own pleadings failed to show his entitlement to the certification, the courts below properly denied his claims for relief against the clerk of the court.

B. Under the federal witness fee statute, 28 U.S.C. 1821, attendance fees are not payable to convicted prisoners who serve as witnesses. The statutory requirement that the witness be "in attendance" at a federal court proceeding refers to a witness who has been summoned to be present by process directed to him and who then makes himself available to testify by "attending" the trial. A convicted prisoner, such as petitioner, appears at trial under a writ of habeas corpus ad testificandum issued to his custodian. A prisoner thus does not "attend" the trial in response to process issued to him, but rather is "produced" for trial as a result of process issued to his custodian.

The structure and purposes of the witness fee statute fully support this construction of the statutory language. Section 1825, which implements the witness fee entitlements of Section 1821, clearly contemplates that defense witnesses such as petitioner will be paid a witness fee only if they testify pursant to a subpoena. Accordingly, Section 1825 indicates that witnesses "in attendance" at a trial (and thus entitled to a witness fee) do not include witnesses, such as convicted prisoner witnesses, whose presence is obtained by process issued to their custodians, rather than by summoning the witnesses themselves.

The history of federal witness fee legislation over the past 200 years confirms that Congress has not granted witness fees to convicted prisoners. Although the federal witness fee statute has been amended many times, convicted prisoners have never explicitly been granted witness fees and have not been awarded fees in practice. Moreover, the policy underlying the witness fee statute is to compensate witnesses for the costs of attending court. Prisoners, who suffer no such costs, are therefore not within the class of intended beneficiaries of the statute.

Finally, the long and consistent line of judicial decisions, administrative rulings, and practical experience in this area show that Congress has been legislating against a background in which prisoners have never been considered eligible to receive witness fees. In these circumstances, there is no reason to disturb the court of appeals' decision denying witness fees to petitioner.

ARGUMENT

PETITIONER IS NOT ENTITLED TO WITNESS FEES UNDER THE FEDERAL WITNESS FEE STATUTE

A. Petitioner Has Not Satisfied The Requirements Of 28 U.S.C. 1825

Regardless of whether convicted prisoners are generally eligible for witness fees under the federal witness fee statute, there is a threshold barrier to petitioner's claim in this case. Petitioner has failed to satisfy two of the statutory prerequisites to the relief he seeks.

Petitioner seeks an order requiring respondent Manspeaker to certify that petitioner attended court as a witness in the criminal case against Ronald Brooks Tippett. The statutory duty to make such a certification in appropriate cases is set forth in 28 U.S.C. 1825(a)(2). Under that provision, the clerk of the district court is required to make such a certification, but only when (1) the defendant is represented by appointed counsel, (2) the witness was a defense witness appearing under a subpoena issued upon approval of the court, and (3) the defendant's attorney files "an affidavit of [the witness's] attendance" with the clerk of the court. 18 U.S.C. 1825(a).

In his request for relief filed with the district court, petitioner alleged that Tippett was represented by appointed counsel, J.A. 3, but he failed to allege that the other two requirements of Section 1825(a)(2) were satisfied. He asserted that his presence at the trial had been obtained by writ of habeas corpus ad testificandum, rather than by subpoena, J.A. 2, and he made no claim that Tippett's counsel had prepared an affidavit regarding petitioner's attendance at the trial.

Because the witness fee statute imposes no duty on the clerk of the court unless the three statutory conditions are satisfied, the clerk was not required to prepare the certificate that petitioner requested. For that reason, the district court properly denied petitioner's request and dismissed his complaint, without regard to whether an incarcerated prisoner may ever receive witness fees in a federal criminal case.[4]

B. Convicted Prisoners Are Not Entitled To Receive Witness Fees

The federal witness fee statute provides that fees and allowances shall be paid to witnesses "in attendance" at a federal court proceeding. 28 U.S.C. 1821(a)(1). Petitioner regards the term "in attendance" as meaning simply "present" at the trial. We submit that the term means more—that it refers to a witness who has been summoned to be present and who makes himself available to testify by "attending" the trial. In *Hurtado* v. *United States*, 410 U.S. 578 (1973), this Court employed the definition we suggest when it characterized the federal witness fee statute, and the term "attendance" in particular, as "reach[ing] those witnesses *who have been summoned* and are in necessary attendance on the court, in readiness to testify." 410 U.S. at 584 (emphasis added). Under that definition, a witness who has not been summoned is not "in attendance," and is there-

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[4] The issue of petitioner's noncompliance with Section 1825(a)(2) was not addressed by the courts below, and it was not raised by the government, which filed no brief in the district court or in the court of appeals in petitioner's case. Nonetheless, because a respondent "may rely upon any matter appearing in the record in support of the judgment below," *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982), this Court may affirm the judgment of the court of appeals on that ground. See *Schweiker* v. *Hogan*, 457 U.S. 569, 585 & n.24 (1982).

fore ineligible to receive an attendance fee even though he is a witness and is present at the trial.

Petitioner asserts that the plain meaning of the statute resolves this case, and that he is entitled to a witness fee because he was both "a witness" and "in attendance" at the trial. But the statute is not as broad as petitioner's argument suggests. For example, a party to a lawsuit who takes the stand in his own behalf is a "witness" who is "in attendance" at the trial, as petitioner uses that term. Yet it has long been settled that a party who testifies is not entitled to witness fees. See *The Wahkenna*, 51 F.2d 106, 108-109 (W.D. Wash. 1931); *The Philadelphia*, 163 F. 438, 439 (E.D. Pa. 1908); *Roundtree* v. *Rembert*, 71 F. 255 (C.C.D.S.C. 1896); *The Progress*, 48 F. 239, 240 (E.D. Pa. 1891). Although a party-witness is both a witness and present at trial, he does not "attend" the trial in the sense that term is used in Section 1821, since he does not have to be summoned to the place of trial, abandoning his other activities in order to comply with the order to appear as a witness.

Because the statutory term "in attendance" does not include all persons who are both witnesses and present at trial, it is necessary to go beyond the colloquial use of that term in order to understand the scope of the statute. We submit that our narrower interpretation of that statutory language is consistent with both the structure of the statute and its purposes, as revealed by its history.

1. *The Structure Of The Statute*

An important clue to the scope of Section 1821(a) can be found in Section 1825, which sets forth the procedure by which witnesses are to be paid the fees due them. In the case of indigent defendants, Section

1825(a) provides for the payment of fees to defense witnesses "appearing pursuant to subpoenas issued upon approval of the court." That provision contemplates that only defense witnesses appearing under subpoena are entitled to receive witness fees. Witnesses whose appearance is obtained by other means are not paid any witness fee at all.

Most trial witnesses are summoned by subpoena. Prisoners, however, are not subpoenaed, since they do not control their whereabouts and therefore are not free to comply with the subpoena's command. See *Story* v. *Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982); *In re Thaw*, 166 F. 71, 74-75 (3d Cir. 1908) ("If the desired witness is confined in jail * * * a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him."). Instead, the presence of a prisoner witness is obtained by the writ of habeas corpus ad testificandum, which is directed to the prisoner's custodian and which orders the custodian to produce the prisoner at a particular time and place. See *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34, 38-39 (1985); *United States* v. *Hayman*, 342 U.S. 205, 220-222 (1952); see also 8 Wigmore, *Evidence* § 2199 (McNaughten rev. ed. 1961); S. Rapalje, *A Treatise on the Law of Witnesses* § 301, at 515-516 (1887).[5]

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[5] The common law writ of habeas corpus ad testificandum was codified in Section 14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 81-82, which provided for issuance of the writ with respect to "prisoners in jail * * * where they * * * are necessary to be brought into court to testify." See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94, 99 (1807). Statutory authorization for the ad testificandum writ has existed since that time, and the current federal habeas corpus statute provides

Because the writ of habeas corpus ad testificandum runs against the custodian, the prisoner's presence at trial is the result of his custodian's decision to comply with the demands of the writ. Thus, while a "writted" prisoner is present at the trial, he does not "attend" the trial in response to process issued to him, but rather is "produced" for trial in response to process issued to his custodian.[6]

Petitioner argues that the structure of the statute supports his interpretation of its scope. In particular, he contends that the express exception of incarcerated witnesses from those eligible to receive the subsistence allowance provided by Section 1821(d)(1) "removes any doubt that an incarcerated witness is a 'witness' within the meaning of subsection (a)(1)." Br. 15.

While subsection (d)(1) of Section 1821 may indicate that an incarcerated witness is a "witness," it does not suggest that such a witness is entitled to an attendance fee under subsection (a)(2). Congress needed to except incarcerated witnesses from subsection (d)(1), because otherwise that subsection could be read to provide a subsistence allowance to all witnesses, whether incarcerated or not. By contrast, since the attendance fee is to be paid only for "attendance," 28 U.S.C. 1821(b), and since convicted prisoner witnesses do not "attend" the trial, Congress had no need to include a specific exclusion for convicted prisoners in subsection (b).

That same point provides the answer to petitioner's reliance on Section 1821(e), which renders certain illegal aliens ineligible to receive witness fees and allowances. Petitioner argues (Br. 20-21) that the express exclusion of illegal aliens shows that Congress did not intend to exclude another category of witnesses—convicted prisoners—from receiving witness fees. But it was not necessary for Congress to create an explicit exemption for convicted prisoners if, as we contend, prisoner witnesses were already barred from receiving attendance fees by the requirement that eligible witnesses "attend" the trial, *i.e.*, that they be summoned to testify and appear in response to that summons.[7]

2. *The History Of The Statute*

The history of federal witness fee legislation over the past 200 years makes three points clear. First, convicted prisoners have never been paid witness fees and have never been regarded as eligible for such

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that the writ shall "extend to a prisoner * * * [where it] is necessary to bring him into court to testify * * *." 28 U.S.C. 2241(c)(5); see *United States* v. *Mauro*, 436 U.S. 340, 357 (1978). In accordance with the common law antecedents, the habeas corpus statute provides that the writ "shall be directed to the person having custody of the person detained," and that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." 28 U.S.C. 2243. See generally 1 J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 21.1, at 303 (1988); 1 *Prisoners and the Law* 12-5 (I. Robbins ed. 1989).

[6] For that reason, petitioner's contention (Br. 25-29) that payment of fees to convicted prisoner witnesses will further Congress's goal of encouraging individuals to testify is wide of the mark.

[7] As the Court made clear in *Hurtado*, a detained material witness is "in attendance" at the court before which he is to testify, since he is summoned by a process that in effect amounts to service of a subpoena with a special guarantee of appearance. Unlike a convicted prisoner, a material witness is detained for the purpose of giving testimony. His detention is thus part of the process of summoning him to testify.

fees.[8] Second, witness fees have traditionally been extended only to witnesses summoned by subpoena or the equivalent, a class that does not include convicted prisoners. Third, the policy underlying the witness fee statute has always been to compensate witnesses for the inconvenience and expense of having to testify, and that policy does not apply to convicted prisoners.[9]

The current witness fee statute, 21 U.S.C. 1821, traces its origin to legislation enacted in 1792. Act of May 8, 1792, ch. 36, § 3, 1 Stat. 277.[10] Since then, Congress has expressly provided fees for only one class of imprisoned witnesses—persons detained as material witnesses.

The 1792 witness fee statute provided that "witnesses summoned in any of the courts of the United

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[8] Petitioner has not been able to identify a single instance under federal or state practice in which a convicted prisoner received a witness fee.

[9] Petitioner contends (Br. 11-21) that resort to the legislative background of Section 1821 is improper where the terms of the statute are clear and unambiguous. As we have discussed, however, the language of the statute is not dispositive in petitioner's favor. Review of the historical background of the statute is therefore appropriate, particularly since the federal witness fee statute "did not flare on the legislative scene with the suddenness of a meteor." *Public Citizen* v. *United States Department of Justice*, 109 S. Ct. 2558, 2567 (1989). See generally *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 432 (1986); *Watt* v. *Alaska*, 451 U.S. 259, 267-273 (1981); see also *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, J.).

[10] Three years earlier, the First Congress had enacted a general statute providing that modes of process and rates of fees would be the same as in the State in which the lawsuit was filed. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93.

States" would receive "the same compensations in each state respectively as are allowed in the supreme courts of the same." Although evidence of contemporary state practice is sparse, Congress's use of the term "summoned" is telling.[11] That term referred to the legal process by which federal marshals called persons for service as witnesses—the issuance and service of a subpoena.[12] See H.R. Rep. No. 50, 32d

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[11] In 1807, the Senate received a compendium of state witness fee statutes, apparently as part of a continuing oversight of federal court fees and costs. See American State Papers, Class 10: S. Misc. Doc. No. 237, Vol. 1, at 656 (1807) (S. Rep., *Table of Fees and Compensation of the Attorneys and Officers, Jurors and Witnesses, of Courts in Each State*, 10th Cong., 1st Sess. (1807)). Of the provisions reported from 17 States, a majority simply provided a flat fee and travel allowance for "witnesses" who appeared before state courts. Those statutes shed little light on the practice regarding prisoner witnesses. See, *e.g.*, *id.* at 657 (New Hampshire); *id.* at 674 (Connecticut).

A number of the reported state laws, however, suggest a practice of excluding prisoner witnesses from receiving the statutory fee. Ohio, for example, paid witness fees only to those persons "going to, attending at, and returning from court, under a subpoena * * *." American State Papers, Class 10: S. Misc. Doc. No. 237, *supra*, at 700. The practice under that provision would have excluded convicted prisoners since they would not have appeared in court under subpoena. Moreover, several state laws referred to a witness's attendance in court within or outside "his own country," *id.* at 669 (New York); *id.* at 696 (Kentucky), or his "home" or "place of residence," *id.* at 658 (Massachusetts); *id.* at 673 (New Jersey). Prisoners, by virtue of their incarceration, did not acquire legal residence at the jail, and thus do not appear to be the sort of witnesses the statutes sought to compensate.

[12] See Act of May 8, 1792, ch. 36, § 3, 1 Stat. 276; 3 W. Blackstone, *Commentaries* *279; J. Goebel & T. Naughton, *Law Enforcement in Colonial New York* 400, 416, 425, 432 (1944).

Cong., 1st Sess. 3 (1852) ("[w]itnesses have always been summoned by serving on them a writ of subpoena"; the act of "summoning a witness" generally means "serving a writ of subpoena"). Convicted prisoners, however, could not be brought to court by such process. The original witness fee statute therefore did not make witness fees available to prisoners.

In 1796, Congress for the first time established a specific fee (50 cents per day) for witnesses "attending in the courts of the United States." Act of June 1, 1796, ch. 48, 1 Stat. 492. Although Congress omitted the term "summoned" that was contained in the previous law, there is no suggestion that Congress intended to alter the class of persons to whom the fees would be paid: the reference to witnesses "attending" was apparently regarded as equivalent to the reference in the earlier statute to witnesses who were "summoned" and who appeared in response to the summons. See generally American State Papers, Class 10: H.R. Misc. No. Doc. 61, Vol. 1, at 120-122 (1795) (H.R. Rep., *Fees of Courts*, 3d Cong., 2d Sess. (1795)).

The absence of any intention to broaden the class of witnesses entitled to fees was confirmed by Congress's revision of the witness fee statute in 1799. In that enactment, Congress provided for "witnesses summoned in any court of the United States, the same allowance as is above provided for jurors," namely,

> for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the court is holden, and the like for returning.

Act of Feb. 28, 1799, ch. 19, § 6, 1 Stat. 626. Once again, Congress's use of the term "summoned" appears to have restricted the statute's reach to those witnesses whose appearance was produced by subpoena or its equivalent. See *United States* v. *Williams*, 28 F. Cas. 646 (C.C.D.D.C. 1804) (No. 16,709) (out-of-town witness who testified before grand jury may receive fees, because although witness was not subpoenaed, he testified at the request of the United States attorney in lieu of a subpoena). And the allowance for travel between the witnesses' "respective places of abode" and "the place where court is holden" obviously did not contemplate that prisoners would be among the beneficiaries of the statute.

Congress next revised the witness fee statute in 1826, when it enacted legislation providing fees for persons detained as material witnesses. See Act of May 20, 1826, ch. 75, 4 Stat. 174. The incarceration of material witnesses unable to post bond sufficient to assure their appearance was authorized by the Judiciary Act of Sept. 24, 1789, ch. 20, § 33, 1 Stat. 91, passed by the First Congess.[13] At that time, however, Congress enacted no provision authorizing payment of fees to such detained witnesses. See *Hurtado* v. *United States*, 410 U.S. at 586 n.7. In the absence of such a provision, there was uncertainty as to whether such witnesses were entitled to fees.[14]

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[13] The current material witness statute is codified at 18 U.S.C. 3144.

[14] Compare *Higginson's Case*, 12 F. Cas. 132 (C.C.D.D.C. 1802) (No. 6,471) (detained witness entitled to fees "for the whole time she was detained") with American State Papers, Class 9: H.R. Claims Doc. No. 130, Vol. 1, at 263 (1802) (H.R. Rep., *Imprisonment of a Witness in Default of Security*,

Congress responded to the problem by authorizing United States marshals to pay detained material witnesses an attendance fee for each day they were imprisoned. Act of May 20, 1826, ch. 75, 4 Stat. 174.[15] Congress adopted that provision in response to a grievance filed by several detained witnesses who had testified as government witnesses in criminal cases, but were unable to collect witness fees for their service. H.R. Rep. No. 87, 19th Cong., 1st Sess. 1 (1826). The express extension of witness fees to one class of imprisoned witnesses—detained material witnesses—strongly suggests that other imprisoned witnesses, such as convicted prisoner witnesses, were not within the general class of witnesses entitled to the statutory fee.[16]

7th Cong., 1st Sess. (1802)) (Claims Committee recommends rejecting private petitioner's request for witness fees for period of time she was detained as a material witness, where federal court had allowed her only "the customary fees for the time she actually attended as a witness"); see also 1 Op. Att'y Gen. 424 (1820); 1 Op. Att'y Gen. 344 (1820).

[15] See also American State Papers, S. Exec. Doc. No. 73, Vol. 9 (1852) (S. Rep., *Report of the Secretary of the Treasury*, 32d Cong., 1st Sess. 10 (1852)) (recounting Congress's enactment of 1826 legislation in response to opinions of the Attorney General).

[16] Congress again revised the witness fee statute in 1853 as part of a general revision of the schedule of fees and costs in federal courts. Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 167; see H.R. Rep. No. 50, 32d Cong., 1st Sess. 1-6 (1852). In examining the fees United States marshals received for serving process, the House Judiciary Committee distinguished between the fee for summoning ordinary witnesses by subpoena and the fee for bringing prisoners into court by writ of habeas corpus. See *id.* at 3-4, 5; see also *id.* at 17-19.

In 1899, the Comptroller of the Treasury issued an opinion upholding the practice of not paying fees to convicted prisoners. A United States marshal had sought the Comptroller's authorization to pay a witness fee and travel allowances to a convicted federal prisoner who testified as a government witness before a United States commissioner. The Comptroller declined to authorize the disbursement, concluding that there was "no provision of law for the payment of witness fees to a person imprisoned in a penitentiary or jail, except in the case of a person who is detained in prison as a witness for want of security for his appearance * * *." 9 Decisions and Letters, Office of the Comptroller of the Treasury 860, 860 (June 12, 1899). The travel allowance was inapplicable, the Comptroller explained, because "[a] person in a penitentiary convicted of crime, while so serving his sentence, can not legally be said to have any place of residence." *Id.* at 861. And such a witness is not entitled to a fee for his appearance because, as a result of the criminal conviction and sentence, he "thereby forfeits his time to the Government." *Ibid.*

Congress revised the witness fee statute in 1926. In addition to the attendance fee, the 1926 statute granted witnesses (other than government employees and detained witnesses) a subsistence allowance of $3 per day. Act of Apr. 26, 1926, ch. 183, §§ 1, 3, 44 Stat. 323, 324.[17] In establishing a subsistence al-

[17] The Act did not repeal the provision of prior law (Revised Statutes § 848) that granted detained material witnesses compensation of $1 per day. That provision from prior law survived because the 1926 statute repealed only those portions of the prior law that were in conflict with the 1926 legislation. Act of Apr. 26, 1926, ch. 183, § 5, 44 Stat. 324.

lowance for ordinary witnesses, Congress sought to "take care of [the] necessary expenses" incurred by witnesses subpoenaed to testify at trial. H.R. Rep. No. 308, 69th Cong., 1st Sess. 2-3 (1926); see also *Fees of Witnesses and Jurors: Hearing on H.R. 70, H.R. 120, H.R. 5216, H.R. 5417, H.R. 6092, and H.R. 8384 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 6 (1926) (statement of Rep. Burtness) ("A witness who is subpoenaed by the arm of the Government to appear in a criminal prosecution and is treated in that way [*i.e.*, not paid sufficient fees to cover traveling and living expenses] can not be blamed very much, perhaps, if he has not always a friendly attitude to the court or to his Government. He often proves a difficult witness in various respects for the Government. He should receive fair treatment."); *Fees of Jurors and Witnesses: Hearing on H.R. 2860, H.R. 2909, and H.R. 6578 Before the House Comm. on the Judiciary*, 68th Cong., 1st Sess. 10-12 (1924). The emphasis on providing compensation for losses incurred as a result of service as a witness obviously had no application to convicted prisoners.[18]

Other than altering the amounts of the fees, Congress did not significantly alter the language of the 1926 statute until the 1948 Revision of the Judicial Code.[19] In the 1948 Revision, Congress reworded the

[18] Following the enactment of the 1926 statute, the Comptroller General reaffirmed the view of his office that "[t]here is no provision of law for payment of witness fees to a person imprisoned in a penitentiary, jail, or other State institution—serving sentence—the prisoner being already under judicial control and the State or county being charged with his care and support." 18 Comp. Gen. 609, 610 (1939).

[19] The Act of June 30, 1932, ch. 314, § 323, 47 Stat. 413, reduced the per diem fee authorized to be paid to witnesses from $2 to $1.50 and suspended entirely the subsistence fee. The Act of Mar. 22, 1935, ch. 39, § 3, 49 Stat. 105, restored the subsistence fee, and the Act of Dec. 24, 1942, ch. 825, § 3, 56 Stat. 1088, again increased the per diem fee to $2.

witness fee statute and adopted a version of Section 1821 generally similar to the current version. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 950. The following year, Congress raised the amount of the fees and allowances under the witness fee statute. Act of May 10, 1949, ch. 96, 63 Stat. 65. Once again, the pertinent committee report made clear that the purpose of the statute was "to fairly compensate the individual either for his time or expenses incident to his service as a witness," S. Rep. No. 187, 81st Cong., 1st Sess. 1 (1949), a policy that is inapplicable to prisoner witnesses.[20]

In 1968 and 1978, Congress again raised the fees and allowances for witnesses. On both occasions the pertinent committees reiterated that the increases were needed to serve the policy underlying the statute, namely, to make witness service "less burdensome," S. Rep. No. 891, 90th Cong., 1st Sess. 36 (1967), and to "compensate the average witness for the actual costs which witness service entails," including the "variety of incidental travel expenses which witnesses routinely incur," S. Rep. No. 756, 95th Cong., 2d Sess. 1-2 (1978); see H.R. Rep. No. 1651, 95th Cong., 2d Sess. 2 (1978). As both the House and Senate Judiciary Committees stated in 1978,

[20] The 1949 statute also reinstated the $1 per day compensation paid to detained material witnesses, which had been "inadvertently omitted" from the 1948 Revision of the Judicial Code. H.R. Rep. No. 352, 81st Cong., 1st Sess. 16 (1949).

> As a matter of public policy the Government ought not to take the time of citizens, any more than their property, without reasonable compensation. * * * Fair compensation should be provided in order to promote respect for the participation in our system of justice.

H.R. Rep. No. 1651, *supra*, at 3; S. Rep. No. 756, *supra*, at 2.

These concerns were obviously directed at ordinary witnesses, forced to abandon their chosen pursuits in order to take the time to testify. Convicted prisoners, by contrast, were not being asked to forgo other activities that they had the liberty to pursue. Such witnesses therefore were not within the scope of congressional concern.[21]

As part of the 1978 legislation, and in response to this Court's decision in *Hurtado* v. *United States*, *supra*,[22] Congress increased the compensation to detained material witnesses. See 28 U.S.C. 1821(d)(4). In so doing, Congress nowhere suggested a break

[21] See also *Marshals Service Fees, Witness Fees and Amendments to the Jury Service Act: Hearing Before the Subcomm. on Improvements in Judicial Machinery of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 41-42, 94-97 (1977); *Judicial Housekeeping: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 80-82 (1978).

[22] In *Hurtado*, the Court held that under the predecessor version of Section 1821, "a material witness who has been incarcerated is entitled to the $20 compensation for every day of confinement during the trial or other proceeding for which he has been detained." 410 U.S. at 586. The Court reasoned that such a witness "is in the same position as a nonincarcerated witness who is summoned to appear on the first day of trial, but on arrival is told by the prosecutor that he is to hold himself ready on a later day in the trial." *Id.* at 587. For those days in detention before the proceeding began, however, the Court concluded that the statute provided the detained witness only $1 per day. *Id.* at 583-584, 588.

with the well-established past practice of not paying convicted prisoners an attendance fee for their service as witnesses. To the contrary, Congress explained that

> [a]lthough [it] has adjusted other witness fees and allowances to reflect increasing costs, it has made no change in the $1 compensation for incarcerated witnesses [*i.e.*, detained material witnesses]. * * * Ironically, present statutes restrict the category of witnesses upon whom courts may impose the burdens of incarceration but do not provide reasonable compensation to those upon whom such burdens fall.
>
> The proposed legislation amends 28 U.S.C. 1821 to provide that a material witness * * * shall receive a daily attendance fee for each day of his confinement. This approach would not only provide more reasonable compensation for the inconvenience and financial hardships which detention entails but would eliminate the peculiarities of the system of compensation which the Supreme Court mandated by its decision in *Hurtado*.

H.R. Rep. No. 1651, *supra*, at 5; accord S. Rep. No. 756, *supra*, at 3-4. Far from supporting the availability of an attendance fee for convicted prisoner witnesses, the language and policy of the statute providing fees for detained material witnesses demonstrate a concern to compensate persons who would be free to do as they please but for their obligation

to appear as witnesses. See *Hurtado*, 410 U.S. at 581; *id.* at 594 (Brennan, J., concurring). Providing attendance fees for detained material witnesses is therefore consistent with the underlying policy of the witness fee statute; providing attendance fees to convicted prisoner witnesses would not be.

3. *The Uniform Decisional Law and Administrative Interpretation*

At the time Congress amended the witness fee statute in 1978, two federal courts and the Comptroller General had addressed the question whether convicted prisoners are entitled to witness fees, and all three had held that they are not. See *Meadows* v. *United States Marshal*, 434 F.2d 1007, 1008 (5th Cir. 1970) (convicted "prisoners are in the custody of [the government], and they are not in a position similar to ordinary witnesses who must incur private costs in order to testify"), cert. denied, 401 U.S. 1007 (1971); *Marchese* v. *United States*, 453 F.2d 1268, 1270-1271 (Ct. Cl. 1972); 18 Comp. Gen. 609, 610 (1939). Following the 1978 amendments to Section 1821, two more courts of appeals reached the same conclusion. See *United States* v. *Garmany*, 762 F.2d 929, 933 n.2 (11th Cir. 1985); *In re Grand Jury Matter (Witness RW)*, 697 F.2d 103 (3d Cir. 1982), aff'g *In re Witness Fees For Prisoner*, 533 F. Supp. 401, 402-403 (E.D. Pa. 1982). In addition, the Department of Justice promulgated regulations in which the Department formally took the position that witnesses in custody, other than detained material witnesses, are not entitled to witness fees under Section 1821. 51 Fed. Reg. 16,171, 16,173 (1986), codified at 28 C.F.R. 21.4(d).

While an argument based on congressional acquiescence may sometimes be a weak substitute for a clear statement of congressional purpose, the argument is at its strongest when the decisions and practice are familiar, uniform, and longstanding. See *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951). In the case of the witness fee statute, the uniform line of judicial decisions and administrative rulings, as well as the consistent day-to-day practice establish that Congress has been legislating against a background in which prisoners have never been deemed eligible to receive witness fees.[23] Moreover, Congress has repeatedly revisited the witness fee statute without ever explicitly providing witness fees to convicted prisoner witnesses, even though it has regularly addressed the closely related

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[23] State practice appears to accord with the federal practice of not paying convicted prisoners witness fees, and for the same reasons. See 1940 Op. Fla. Att'y Gen. 89, 90; 10 Op. Wisc. Att'y Gen. 1168, 1171-1174 (1921). As one state attorney general observed:

> It should be borne in mind that the process served in this case [*i.e.*, where a convicted prisoner is brought to court to testify] is not a subpoena; the court is not dealing with the witness as such, but is dealing directly with the custodian of the convict. As far as the convict is concerned, his status does not change in any respect by virtue of the fact that he gives testimony in court. The time consumed does not belong to the convict. There is no justice or reason in permitting him to collect a fee for appearing as a witness in court while he is in the custody of the prison authorities.

Id. at 1173.

topic of providing fees for detained material witnesses. In this setting, Congress's failure to change the statute in a manner that would overrule the universal practice and the uniform line of decisions provides further evidence that the decision of the court of appeals denying witness fees to petitioner correctly reflected Congress's will.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Title 28, United States Code, Section 1821, provides in pertinent part:

Per diem and mileage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

* * * * *

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendence. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of

the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) * * * of title 5, for official

travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 * * * of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.[1]

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive fees or allowances provided by this section.

Title 28, United States Code, Section 1825, provides:

Payment of fees

(a) In any case in which the United States or an officer or agency of the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, and in the proceedings before a United States magistrate, on the certificate of such magistrate, except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the

[1] 18 U.S.C. 3149, the federal material witness statute, is currently codified at 18 U.S.C. 3144.

court, shall be paid by the United States marshal for the district—

(1) on the certificate of a Federal public defender or assistant Federal public defender, in a criminal case in which the defendant is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such other counsel.

(b) In proceedings in forma pauperis for a writ of habeas corpus, and in proceedings in forma pauperis under section 2255 of this title, the United States marshal for the district shall pay, on certificate of the district judge, all fees of witnesses for the party authorized to proceed in forma pauperis, except that any fees of witnesses for such party, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—

(1) on the certificate of a Federal public defender, in any such proceedings in which a party is represented by such Federal public defender or assistant Federal public defender, and

(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by other counsel appointed pursuant to section 3006A of title 18, in any such proceedings in which a party is represented by such other counsel.

(c) Fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States or an officer or agency of the United States, upon service of a subpoena issued on behalf of a defendant represented by a Federal public defender, assistant Federal public defender, or other attorney appointed pursuant to section 3006A of title 18, or upon service of a subpoena issued on behalf of a party authorized to proceed in forma pauperis, if the payment of such fees and mileage is to be made by the United States marshal under this section.

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